No. 139.

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Brf. of Oren & Maynard for D

United States.

Filed Oct. 25, 1902.

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No. 139.

THE DETROIT, FORT WAYNE and BELLE ISLE RAILWAY,

Plaintiff in Error,

vs.

CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

Motion to Dismiss for Want of Jurisdiction, or to Affirm the Judgment, and Brief in Support Thereof.

HORACE M. OREN,
Attorney General of Michigan,

FRED A. MAYNARD,

Attorneys for Defendant in Error.

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Defendant in Error.

Motion to Dismiss for Want of Jurisdiction, or to Affirm the Judgment, and Brief in Support Thereof.

Comes now the defendant in error, in this cause, and moves this Honorable Court to dismiss the Writ of Error herein, because, he says, this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that, even if the court has jurisdiction, the writ was taken for delay only, and

the question on which the jurisdiction depends is so frivolous as not to need further argument.

In support of this motion we assign the following reasons:

1. There is no Federal question arising on the record filed in this court.

2. No Federal question arose in the Supreme Court of Michigan, the court of last resort in that State, which was decided against the title, right, privilege or immunity set up or claimed by the plaintiff in error.

3. This case simply involves the construction of a statute of said state, and no Federal question is raised thereby because, in its decision, said state court did not give such a construction to said statute as to make it conflict with the constitution or laws of the United States, and sustaining its validity after giving it such construction.

4. The Supreme Court of the State did not refer to the Federal constitution, or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

5. Assuming that a Federal question was presented for decision by the state court, it affirmatively appears that its decision was not necessary to the determination of the case, and it further affirmatively appears that said State Supreme Court did not decide said Federal question adverse to the plaintiff in error.

6. The judgment of said State Supreme Court was

properly rendered without deciding the Federal question presented, or attempted to be presented, by the plaintiff in error.

7. The questions, not Federal, which were presented to said State Supreme Court, by the plaintiff in error, and decided against it, were sufficient to sustain its judgment, and, therefore, this court will not review the same.

8. In other words, the ground upon which the judgment rested was broad enough to sustain it without deciding any Federal question, if there was any in the case.

9. No property of the company has been taken, and the duty which the order imposed was by due process of law.

10. The attempted injection of so-called "Federal questions" into the record was solely for delay, and are frivolous.

To BRENNAN, DONNELLY & VAN DE MARK,

Attorneys of Record for Plaintiff in Error in the above entitled cause:

You are hereby notified that the Defendant in Error, in the above entitled cause, will, on Monday, the first day of December, A. D. 1902, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

HORACE M. OREN,
Attorney General of Michigan,
FRED A. MAYNARD,
Attorneys for Defendant in Error.

BRIEF IN SUPPORT OF MOTION.

We respectfully ask this Honorable Court to dismiss the Writ of Error, in the above entitled cause, for the want of jurisdiction, on the authority of Eustis V. Bolles, 150 U. S., p. 361.

In the foregoing motion we have assigned reasons why this Court has no jurisdiction to review the judgment rendered by the Supreme Court of Michigan in this case. They are taken from and based on the decisions of this Court. In the language of Mr. Justice McKenna, in delivering the opinion of the court, in Harrison vs. Morton, 171 U. S., pp. 38-47: "It is not necessary to review these decisions. That has been done by Mr. Justice Shiras in Eustis vs. Bolles, 150 U. S., 361, as follows:

"It is settled law that, to give the court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock vs. Memphis, 87 U. S. (20 Wall., 500); Cook County vs. Calumet & C. Canal & D. Co., 138 U. S., 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding

the Federal question, to sustain the judgment, this court will not review the judgment."

Other decisions of this court, on which the reasons assigned in the motion are based, are entitled as follows:

Simmerman vs. Nebraska, 116 U. S., 54.
California Powder Works vs. Davis, 151 U. S., 389.
Missouri P. R. R. Co. vs. Fitzgerald, 160 U. S., 556.
Fowler vs. Lamson, 164 U. S., 252.
Iowa Central R. R. Co. vs. Iowa, 160 U. S., 389.
Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.
Miller vs. Cornwall R. Co., 168 U. S., 131.
Chappell Chemical & F. Co. vs. Sulphur Mines Co., 172 U. S., 465.
New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18.
Clark vs. Pennsylvania, 128 U. S.. 395.
De Saussure vs. Gaillard, 127 U. S., 216.
Kansas Endowment & Benev. Assn. vs. Kansas, 120 U. S., 103.
Church vs. Kelsey, 121 U. S., 282.
Kennebec & P. R. Co. vs. Portland & R. R. Co., 81 U. S., 14 Wall., 25.
Rector vs. Ashley, 73 U. S., 6 Wall., 142.
Gibson vs. Chouteau, 75 U. S., 8 Wall., 314.
Klinger vs. Missouri, 80 U. S., 13 Wall., 257.
Detroit City R. Co. vs. Guthard, 114 U. S., 133.

There is no question whatever that the rules declared in

Eustis vs. Bolles, and in the other cases cited, are the "settled law" of this country.

It only remains to apply them to the facts of this case.

The record shows that in 1893 the Legislature of Michigan passed Act No. 171, which provides (Sec. 5) "that the Commissioner of Railroads shall * * * * examine the crossings of the tracks of railroads, and street railroads, then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents, to be provided thereat, as in his judgment ought to be made and provided; and shall apportion any expense incident thereto between the companies affected, as he may deem just and reasonable."

Under the authority of this Act, the defendant in error ordered the construction of certain safety devices and apportioned the expense of its construction and maintenance between the Terminal Association and the plaintiff in error.

The plaintiff in error sought, by mandamus proceedings, to have said order revoked by the Supreme Court of Michigan.

The point relied on by the plaintiff in error, in its brief, in the Supreme Court of Michigan, as appears on page 20 of the record, was this:

"There are a number of important questions involved in this controversy, one being the extent of the authority of the railroad commissioner over street railway companies. We feel it necessary, however, to suggest only one of these questions, because the adjudication thereof in the manner we anticipate will render a consideration of the others unnecessary.

"We call attention to the fact fully set out in the petition that the necessity for the order of the railroad commissioner, if any there be, is due to the construction of the Terminal Association's tracks after petitioner's tracks were laid. The danger is not caused by petitioner, nor due to its presence in the street. Under the well-settled rule of this court the cost of making the crossing safe must be borne by the company making the crossing and responsible for the danger."

In its reply brief, and on the argument, the question as to whether a street railway is, or is not, an additional servitude, was also considered.

The only reference to Federal questions in the entire record in the court below is found in a few lines, in the petition, record page 17, and nine lines, in the shape of a rider, on the thirtieth page of its reply brief, simply referring to the sections of the Federal Constitution.

We submit that under such circumstances it is not strange that the Supreme Court of the State of Michigan did not refer to the Federal constitution, or consider and decide any Federal question. As was said by Mr. Chief Justice Fuller, in another Michigan case, sought to be brought to this court, Michigan Sugar Co. vs. Dix, Auditor General, S. C. Rep., Vol. 22, p. 581: "For aught that appears the court proceeded in its determination of the cause without any thought that it was disposing of such questions."

The questions presented to the Supreme Court of Michigan were purely state questions, calling for a construction of a state statute.

This court has many times said "that it is the peculiar

province and privilege of the state courts to construe their own statutes; and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized so to do."

Commercial Bank vs. Buckingham, 5 How., 317.
Adams vs. Preston, 22 How., 473.
Congdon Mining Co. vs. Goodman, 2 Black, 574.
Smith vs. Adsit, 16 Wall., 185.
Klinger vs. Missouri, 13 Wall., 257.
Murray vs. Gibson, 15 How., 421.
Nichols vs. Levy, 5 Wall., 433.

And this is true, although the position of the state court is an unsound one.

De Saussure vs. Gaillard, 127 U. S., 216.

There can be no question whatever that no Federal questions are presented in the points relied on by the plaintiff in error above referred to. The first point is answered by showing that the legislation itself, and the order of the railroad commissioner based thereon, was simply in the exercise of the police power of the state, and approved by the elementary principles governing the same.

The second point, as to whether a street railway is, or is not, an additional servitude, while an important one, raises a purely state question, and, under the facts of this case, a purely immaterial one, for this reason: No street railway corporation can lay its tracks, in any public highway, and run its cars thereon, for business purposes, without first obtaining

the consent of the public authorities, and this consent is always given with the express condition that the company will obey all reasonable regulations for the protection of the public, which may then, or thereafter, be enacted by said public authorities.

This court supervises decisions of state courts only when a Federal question arises, and, of its own motion, will deny its jurisdiction unless it affirmatively appears, on the face of the record, although neither party makes the point in argument.

King Iron Bridge vs. Otoe Co., 120 U. S., 225.

There are, we insist, no Federal questions in this case, unless they can be injected into any case, in any court, by the simple assertion that the complaint, bill or declaration, or the statutes on which they are based, are contrary to certain provisions of the Federal constitution. If, by simple pleading, jurisdiction can be given this Court, then it will indeed "become the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals." But such, of course, is not the law.

"Something more than a bare assertion of such authority is essential to the jurisdiction of this Court."

Millingar vs. Hartupee, 6 Wall., 258.

"A real, and not a fictitious Federal question, is essential to the jurisdiction of this Court over the judgments of state courts."

Hamblin vs. Western Land Co., 147 U. S., 532.

"The bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay."

New Orleans vs. New Orleans Water Works Co., 142 U. S., 79.

"We do not think it necessary to narrowly inquire whether the record formally discloses that the respondents relied upon and pleaded rights under the Constitution of the United States, because we are of the opinion that even if it be conceded that the respondents did, in form, invoke the provisions of the Federal Constitution, yet that no Federal question was really raised. The bare averment in the answers of supposed infringements in the proceedings of rights possessed by respondents under the Constitution of the United States will not alone suffice."

St. Louis, Girardeau & Fort Smith Ry. Co. vs. State of Missouri, 156 U. S., 478.

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

Wilson vs. State of North Carolina, 169 U. S., 586-595.

"It does not follow, however, that the case at bar is one

of federal cognizance because it contains a reference to numerous acts of congress, and lengthy extracts therefrom. A case which in fact depends for its decision upon questions of local or general law cannot be brought within the jurisdiction of a federal tribunal as one arising under the constitution and laws of the United States merely by a reference in the complaint or declaration to some federal statute or statutes, and by setting up a claim thereunder which is merely colorable, and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the federal courts would be unduly enlarged, and made to comprehend a class of cases which were never intended to be tried therein."

St. Paul, M. & M. Ry. vs. St. Paul & N. P. R. Co.
68 Fed. Rep., 11.

Even if this Court should determine the point of want of jurisdiction against us, we then ask that the same course be taken as was adopted in

New York & New England R. R. Co. vs. Town of Bristol, 151 U. S., 556,

wherein Mr. Chief Justice Fuller, in delivering the opinion of this Court, said:

"We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said under the circumstances to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

The aid of the same sections of the Federal constitution

is invoked in the case at bar as in the case just referred to, viz., Sec. 10, Art. I, relative to the deprivation of property, etc., without compensation and without due process of law, and impairing the obligation of contracts, and the equal protection of the laws, guaranteed by Section I of the Fourteenth Amendment.

The same answer can be made in this case as in that, as follows:

"It is likewise thoroughly established, in this court, that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. And also that 'a power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of a charter, granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.' * *

"As observed by Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S., 97, the fourteenth amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against

him, and of the merits of the legislation on which such a decision may be founded.' * * * *

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

The order made in the case at bar is not near so hard as in the one just above named. We have here the same constitutional and statutory power to amend, alter or repeal the charter of the company. The only difference is, that, in the case at bar, the plaintiff in error is a street railway corporation, instead of an ordinary steam railroad corporation, and

the whole argument of relator rests on an alleged distinction which the legislatures, and the courts of this country, must make in their treatment. We say, that so far as any matters now under consideration are concerned, they can and should be treated alike, and we use, in conclusion, the language of Mr. Justice Moore, who delivered the opinion of the Supreme Court of Michigan in deciding this case: "Though the decisions are not uniform, it may be considered as now settled, by the great weight of authority, that the use of a street railway company, under proper regulations, even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation. It does not follow, however, from these decisions, that the electric car * * does not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motor-man, at a speed from simply moving to forty or fifty miles an hour, through the public streets of a city, is not a different use of the street and a source of greater danger to the public, than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. * * * New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers

in the steam cars, but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances, the state, in the exercise of its police power, can take such steps as will minimize the danger and can impose the expense of doing so upon the corporations causing the danger."

In conclusion, we ask that our motion to dismiss be granted on the ground that no Federal question appears on the face of the record, or the judgment of the court below be affirmed on the ground that the principles to be exercised in the disposition of the case are so well settled that no further argument is needed.

Very respectfully,

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FRED A. MAYNARD,
Attorneys for Defendant in Error.